

IN SUPPORT OF HB 516

Language:

Section 1. Local governments -- limitation on enactments. A local government ordinance, resolution, or policy may not contain, as a protected class, any classification not specifically included as a protected class under the provisions of this part.

Local Control Versus State Control:

There are some who feel that local control would militate against HB 516, because local governments should be able to pass ordinances with regard to discrimination which is particular to their own local circumstances.

At first blush, this might seem a persuasive argument. However, upon closer consideration, there are certain areas which demand state control. For instance, the state should control open meeting laws in accordance with Article II, Sections 8 and 9 of the Montana Constitution. Likewise, the Montana Constitution has "occupied the field" when it declared specifically the areas where discrimination may not be practiced in Article II--DECLARATION OF RIGHTS:

Section 4. Individual dignity. The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights **on account of race, color, sex, culture, social origin or condition, or political or religious ideas.** [Emphasis added.]

Not only has the Montana Constitution clearly established areas of non-discrimination, but there is good reason for doing so: uniformity and consistency throughout the state. If such decisions were left solely to local governments, some cities might feel that it's all right to discriminate on the basis of "culture," for instance. Or, "social condition."

Likewise, as occurred in Missoula, a city might decide to have an ordinance banning discrimination on the basis of sexual orientation or gender identity. In that particular ordinance, among other requirements, a man who considered himself a woman would be able to use the women's restroom in public places, businesses, and even churches. But a woman who lived in Bozeman, Great Falls, Billings, or Miles City who used a public restroom in Missoula—taking her children in with her—might not know that this was the circumstance—because gender identity is not a state-wide protected group. And in walks a man. It would be shocking enough for a Missoula woman—or even a woman from Hamilton who knew of the ordinance. But the Bozeman woman and her children? What about the effects on business? What about lawsuits against both businesses and the City of Missoula?

In fact, to demonstrate how arbitrary and capricious the process can be without state control, one earlier variation of the ordinance included "veterans" among the classes which shouldn't be discriminated against. This class was later removed, apparently for political reasons.

As further examples of what occur when a local government decides autonomously what will be areas of nondiscrimination, the Missoula homosexual antidiscrimination ordinance had the following problems:

- Unconstitutional concerning religious education and employment -- forcing churches to hire homosexuals against their religious tenets; forcing religious institutions to hire homosexuals in contravention of their religious tenets
- unconstitutional -- forcing ministers to conduct homosexual weddings, baptisms, allowing homosexuals to take care of and teach young children
- unconstitutional -- forcing the Boy Scouts to hire homosexual leaders
- unconstitutional -- forcing people to rent rooms to homosexuals in violation of their own First Amendment rights
- due to the unconstitutionality of this ordinance, lawsuits filed on that basis -- which the city of Missoula will lose -- will cost the city of Missoula hundreds of thousands of dollars -- if not millions -- in attorneys fees and costs
- forcing public schools to obey an ordinance where they have no power. See MCA 7-1-111 (3).
- destructive to businesses where people are afraid to use their restrooms for fear of being assaulted
- violating First Amendment rights -- Islam, Buddhism, Hinduism, Orthodox Judaism -- in addition to Orthodox Christianity -- discriminate against homosexuals, bisexuals, transgenders, etc.
- should a rape or child molestation case occur in the bathrooms of a business, both the business and the city of Missoula will be successfully sued as a result of this ordinance -- again, costing Missoula hundreds of thousands of dollars -- if not millions -- in damages/losses and defense costs
- the ordinance was written by people outside of Missoula -- particularly the ACLU -- concerning a "problem" which various polls show does not exist in Missoula

Frustrated Petition Drive:

When a group sought to form a petition drive to invalidate the ordinance, they were themselves discriminated against by the Missoula City Attorney, Jim Nugent, and the Missoula County Elections Administrator, Ms. Zeier. In order to keep the ordinance from going into effect, the group had only 60 days in which to get the petition approved and collect the required number of signatures. The delaying tactics and obstacles used by both the City of Missoula and Missoula County were as follows:

- Nugent claimed: Only a "legally eligible or qualified registered city elector" could submit a referendum petition or circulate the petition as a signature gatherer. This was a major theme for the denial, either actually or potentially, of any sample petition. However, an examination of prior petitions proved the patent falsity of his demands -- at least as far as what he had required of prior petitioners.

- Nugent confessed that there was no Montana case law which required only qualified registered Missoula City electors to submit petitions or circulate affidavits.
- He required that: "Every petition signature gatherer swears under oath that they are a City of Missoula qualified City resident City elector registered to vote."—a requirement he never made of prior petitioners.
- Nugent claimed that a sample certification or affidavit of petition gatherers is required by Mont. Code Ann. §§ 7-5-132(3)(c) and 13-27-302, entitled "Certification of signatures" -- a demand he never placed on prior petitioners.
- Nugent required: The "affidavit of petition signature gatherer" needs to be modified to provide for a City Ordinance referendum process by specifically referring to legal City resident City electors, rather than the overbroad 'Montana electors' reference utilized for statewide voter referendums." Again, he never required this of prior petitioners.
- Nugent also mandated: "Form" includes affidavits, when he never concerned himself with affidavits in prior petitions.
- Nugent: "If the sample petition was in compliance with Montana Code Ann. § 7-5-131 and 7-5-132 with respect to form by proposing repeal of Order 3428, I could then prepare accurate and impartial ballot language as well as neutral accurate impartial statement of implication language for the repeal of Order 3428." Nugent delayed 39 days after petitioners' first sample petition was submitted before he provided petitioners with "impartial ballot language" and "impartial statement of implication language." However, in prior petitions, Nugent frequently responded within one day -- sometimes even when they were not in compliance -- and was very helpful.
- Nugent stated: "The language of the first paragraph of the petition 'If a majority of voters vote for this measure at that election, Missoula Municipal Ordinance Number 3428 will become law' does not comply with the statutory repeal language for petition referendum form for addressing adopted ordinances pursuant to §§ 7-5-131 and 7-5-132 MCA." Yet again, Nugent concealed from petitioners that he had permitted similar language in the 1994 repeal referendum petition involving "Save the Fort."
- Nugent insisted: "It seems quite elementary and basic for informing the City electorate that the accurate title of Ord. 3428 be included in the Municipal Ordinance referendum petition. The sample petition in the first sentence of the first paragraph should also include the title of Ord. 3428." However, he didn't require the "accurate title" to be used at all in the 1994 petition, nor did he require the title to be used at all in the first sentence of either the 1994 petition or the 2000 petition.

Other evidences of this treatment would be Nugent's examination of petitioners' affidavits, particularly that only qualified Missoula City resident electors should be allowed to be signature gatherers, when:

- In virtually no other prior petitions had the issue of affidavits even come up.

- Nugent required petitioners -- under the same statutes he used to insist only a qualified registered city elector could submit a petition -- to utilize only qualified registered city electors to collect signatures.
- Nugent even delivered a not-so-veiled threat that the City might prosecute a lawsuit against a successful referendum based upon the affidavits' not requiring that only qualified Missoula City resident electors gather signatures.
- When, in fact, on at least two occasions, Missoula County residents (but not Missoula City residents), together with Missoula City residents, collected signatures for city ordinance petitions with complete acquiescence -- and silence -- from Nugent.
- Also, once Nugent was confronted in a meeting with Missoula City Councilwoman, Mrs. Hellegaard, and me with a copy of former Missoula City Councilman John Hendrickson's 2006 affidavit -- which made no such requirements -- over which Nugent had control -- Nugent dropped any discussion of the issue restricting signature gatherers to only qualified Missoula City electors with the petitioners from then on.
- Nugent has argued under the pretense of the petition and referendum statutes that he is required to evaluate the language of affidavits. Why did he not evaluate affidavits on prior petitions?
- That 2006 affidavit -- over which Nugent had control -- was precisely in the form provided by the state in § 13-27-302 MCA. Yet petitioners' first affidavit submitted on April 15, 2010 was also precisely the form provided currently by the state in § 13-27-302 MCA—and Nugent disqualified it, demanding that it must be changed.
- Evidence of prior affidavits used demonstrates that the criticisms which Nugent aimed at petitioners' affidavits were never demanded of any others who submitted petitions.
- Nugent took an oath to uphold his duties as Missoula City Attorney. Part of his office requires him to evaluate petitions in accordance with the applicable statutes. His conduct has demonstrated not only actual fraudulent misrepresentations and concealment -- in addition to discrimination -- but also constitutes a constructive fraud upon petitioners because of his failure as a public official -- particularly as an attorney -- to administer those statutes in a fair and equitable manner to petitioners in a manner comparable to prior petitioners. His conduct, further, is, without question, in derogation of his sworn duties.

With regard to Zeier, as will be shown, below, her silence was an endorsement of Nugent's acts which had to do with form -- an area of responsibility she is tasked with pursuant to 7-5-134(2), (5), and (6):

- Zeier: "When Does the 21 Days Run Out?" This attitude was never displayed against prior petitioners.
- Since Zeier appears to agree with Nugent that "form" -- an area of her responsibility -- includes affidavits, then why did she not make demands upon prior petitioners with regard to affidavits consistent with her demands upon petitioners?

- Zeier's dereliction of duty pursuant to three of petitioners' sample petitions -- she failed to either reject or approve them within 21 days -- or even within 21 days if one were to consider each one of them separately -- had long since passed. This constitutes a constructive fraud upon petitioners: Zeier took an oath to uphold her duties as Missoula County Election Administrator, a representation made to her Missoula County constituents at large -- including petitioners -- and her conscious refusal to obey the mandates of MCA 7-5-134 is, without question, in derogation of her duties and constitutes an intentional misrepresentation. It also constitutes constructive concealment, since she failed to reveal to the petitioners that she would not honor her oath of office.

Frustrated Writ of Mandate:

The petitioners challenged the discriminatory actions of the City of Missoula and Missoula County in a Writ of Mandate. However, the judge in that case on two occasions rendered his judgment against petitioners -- including the final judgment -- **before he even received petitioners' opposition papers.**

For all of these reasons, please support HB 516.

Respectfully submitted,



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406-363-5000